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June Case Law Update
June 30, 2012

[A summary of published Wisconsin court opinions decided during the month of June related to planning]

Wisconsin Supreme Court Opinions

Public Record Fees Do Not Include Cost to Remove Nondisclosable Information

In *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, the Wisconsin Supreme Court determined that the Wisconsin Public Records Law does not allow public authorities subject to the law to impose a fee for the cost of deleting nondisclosable information. The case involved a request by reporters from the Milwaukee Journal Sentinel for dispatch records and related incident reports from the City of Milwaukee Police Department. The City provided the requested documents and charged fees for locating and copying the documents and a fee for staff time spent reviewing and redacting nondisclosable information such as Social Security Numbers, and victim identification information. The Journal Sentinel refused to pay the fee related to the staff time for redaction and brought this lawsuit.

In the Wisconsin Public Records Law, (Wis. Stat. §§ 19.31-.39) the Legislature details the tasks for which an authority may impose fees on a requester. An authority may impose a fee that does not exceed the "actual, necessary and direct" cost of performing the following four tasks: reproduction and transcription of the record; photographing and photographic processing; locating a record; and mailing or shipping of any copy or photograph of a record. Wis. Stat. § 19.35(3). The City argued the cost to remove the nondisclosable information was included in the statutory authorization to recover the cost of locating and reproducing the documents. In an opinion written by Chief justice Abrahamson, the Wisconsin Supreme Court rejected this interpretation finding that the Legislature did not include these costs in the Law. Four of the justices joined in a concurring opinion written by Justice Roggensack that expressed concern about passing the costs of redacting nondisclosable information on to the taxpayers and encourages the Legislature to amend the Public Records Law to address this issue.

Wisconsin Court of Appeals Opinions

Government Immunity for Independent Contractors

In Showers Appraisals, LLC v. Musson Bros., Inc., the plaintiff sued Musson Bros., Inc., and the City of Oshkosh for damages suffered in the floods of 2008. At the time of the floods, Musson was working as a private contractor for the State of Wisconsin to replace the storm sewer in front of Showers' building.

Musson claimed that it is entitled to governmental immunity under *Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 457-58, 558 N.W.2d 658 (Ct. App. 1996), a case extending governmental immunity to independent contractors when certain conditions are met. Wisconsin Statutes, section 893.80(4) provides governmental immunity for certain actions. That statute states, in part: "No suit may be brought against any governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such subdivision or agency or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

Under the *Lyons* case, an independent contractor who follows official directives is an agent entitled to governmental immunity when: (1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

In *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693, the Wisconsin Supreme Court differentiated between the government's discretionary acts and its ministerial duties when applying governmental immunity. Discretionary acts are protected by the statute, but ministerial duties are not. A ministerial duty is defined as one that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." In some cases, a known and compelling danger may give rise to a ministerial duty, when the danger is of such force that the public officer has no discretion not to act in a particular way.

The plaintiff in the present case claimed that the contract with Musson did not include reasonably precise specifications and that Musson did not comply with specifications to provide "adequate" drainage at all times and did not take "reasonable" precautions to prevent damage. The Court of Appeals did not agree. The Court also did not agree that even if Musson met the *Lyons* test, Musson had a ministerial duty to maintain a system of drainage.

The case is recommended for publication. One appellate court judge dissented in the case expressing concern that the decision expanded the *Lyons* case to provide blanket immunity to all governmental contractors.